

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RAY B. WOODBURY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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APPELLANT'S REPLY BRIEF

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Appeal from the Judgment of Dismissal of the  
United States District Court for  
the District of Oregon

THE HONORABLE JOHN F. KILKENNY, Judge

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PRELIMINARY STATEMENT

It is apparent from a perusal of appellee's brief that the issue before this court, i. e., whether breach of fiduciary duty is cognizable under the Federal Tort Claims Act, is unpalatable to appellee. Indeed, as a result of appellee's unwillingness and/or inability to meet this issue, it is often difficult to recognize that appellee's brief is purportedly addressed to the same case as that decided by the trial court and discussed by appellant in his opening brief.



The basic deficiencies in appellee's brief may be

summarized as follows:

1. Many of the "facts" recited therein are inaccurate and unsupported by the record.
2. The alleged arguments urged therein are based upon a misapprehension as to the posture of the case, and, as such, are directed to matters not in issue.
3. There is no discussion or even mention of the issue which is before this court for determination.

These defects will be discussed in order.

#### ARGUMENT

##### I

###### Appellee's brief is factually inaccurate.

In the portion of its brief entitled "Statement of the Case," appellee purports to set forth the facts giving rise to this action. However, its statement is so slanted as at times to be inaccurate, and at other times to be patently incorrect. This is demonstrated by the following examples:<sup>1</sup>

Page 2. At page 2 of its brief, appellee states that "\* \* \* appellant, who had become interested in sponsoring a housing project near a military installation in the vicinity of Kodiak, Alaska, applied for, and was granted a construction loan by HHFA \* \* \*." This is the first of many attempts by appellee to equate appellant with Aleutian Homes, Inc., an Oregon corporation. The latter was incorporated under the laws of the state

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<sup>1</sup>Page references are to appellee's brief



of Oregon for the purpose of becoming sponsor of the Aleutian Homes housing project (R. 54, 90). It applied for and obtained the construction loan from HHFA (R. 57, 92-93). Aleutian Homes, Inc., is not a party to this action, and it is not the appellant on this appeal. Appellant is an individual, Ray B. Woodbury, who seeks to recover funds he personally expended after the execution of the completion agreement and for his interest as a shareholder in Aleutian Homes, Inc.

Page 7. In discussing the background of the completion agreement, appellee states "the Government had no disposition to exercise its right of foreclosure if there was any reasonable means of overcoming the difficulties upon which the project had foundered." It is not surprising that appellee does not support this statement with a citation to the record, for the same is anything but factual. It is rather a mere conclusion of the writer, and as such is not properly found in a supposedly objective recital of facts relative to this case.

Pages 7-8. Appellee's discussion of the circumstances leading to the formation of the completion agreement is typical of its one-sided presentation. Thus, in this portion of its brief it suggests that the purpose behind the completion agreement was a desire on the part of appellant to secure money. This is simply not correct. The completion agreement was entered into in order to obtain further funds, but such funds were to be used to complete the project, to obtain the long-term financing commitment and to pay project creditors. This was the desire of all those who were involved in the project.



Page 8. Relative to the formulation of the completion agreement, appellee states that "negotiations were begun between the sponsor and the project creditors, which resulted in a plan prepared by Aleutian Homes' attorney which was presented to creditors for acceptance and to HHFA to serve as a basis for further disbursement of undisbursed loan funds." Of course, the completion agreement was finally formulated in Washington, D. C., in conferences between appellant, his attorney, and HHFA representatives. Many portions of the agreement were presented by and insisted upon by HHFA. Thereafter, the plan was submitted to the project creditors for their approval. In this connection, the District Court stated (R. 104):

"The evidence is undisputed that HHFA played a major part in all of the negotiations leading up to the signing of the completion agreement on April 23, 1954."

It ill befits appellee now to suggest that the agreement was appellant's product.

Page 8, Footnote 3. In this footnote, appellee states that neither HHFA nor any other government agency was listed in the completion agreement as a party. In fact, HHFA is referred to throughout the completion agreement as "the Lender." Furthermore, there is no significance to the fact that HHFA did not sign the agreement. Thus, the District Court stated (R. 105-106):

"It is true that neither HHFA nor the Administrator signed the completion agreement. However, it is crystal clear that all parties to the agreement anticipated that HHFA would formally accept such obligations as it had under the terms of this agreement.



I am not attempting to distinguish between HHFA and the Administrator. The agreement refers to the Administrator as the 'Lender,' and he will be herein referred to as 'Lender.' Under its terms certain promises were made in order to induce Lender to disburse further proceeds of the loan. The parties agreed to sign all documents required by the Lender. All income from the project and other proceeds were to be assigned to the Lender. Plaintiff agreed to provide certain overhead expenses required by the Lender estimated at \$16,000 per month. The Project Manager had to be acceptable to the Lender and was vested with full and exclusive authority to take all action necessary in connection with the project, subject to the general direction of the Lender. Any and all subcontractors had to be approved by the Lender. The Project Manager was subject to removal on the request of the Lender. In truth and in fact, the Lender had an absolute right to designate the Project Manager and discharge him if Lender so desired. The bank account from which disbursements were made for the completion of the project was in the name of the Lender and the Project Manager. In other words, when the funds were disbursed by the Lender under its commitments, such funds were transferred to a bank account over which the Lender had absolute control. The construction superintendent had to be acceptable to the Lender and was subject only to the direction of the Project Manager and, by inference, subject to removal only by the Project Manager.

"The language in paragraph 18 of the agreement indicates that the only reason it was not signed by HHFA or the Administrator (Lender) was a doubt as to whether the law authorized such execution. The agreement did require written or oral approval by the Lender. The Lender gave written approval of the agreement. Outside of the terms and provisions of the completion agreement the evidence is overwhelming that the Lender in truth and in fact took over absolute control of and proceeded with the completion of the project.

"In my opinion the fact that the completion agreement was not signed by Lender is of no significance. Contractual liability under a written contract may be assumed without signing it. Girard Life Insurance & Trust Co. vs. Cooper, 162 U. S. 529; Laurent vs. Anderson, 6 Cir., 1934, 70 F.2d 819; First National Bank vs. Sleeper, 8 Cir., 1926, 12 F.2d 228; Commercial Standard Insurance Co. vs. Garrett, 10 Cir., 1934, 70 F.2d 969. In fact, the Lender in this case accepted the completion agreement in writing."



The suggestion made in appellee's footnote 3 is, therefore, meaningless.

Page 9. In this portion of its brief, appellee purports to discuss the terms of the completion agreement. However, it fails even to mention the most significant element of that agreement as the same is involved in this action, that is, the fact that under the completion agreement the government assumed complete control of the Aleutian Homes project. For example, as the District Court indicated (supra, page 8), it was necessary that the project manager be acceptable to HHFA, and the latter in turn was vested with full and exclusive authority to take all necessary action in connection with the project, subject to the general direction of HHFA. HHFA had to approve subcontractors. It determined in what manner project funds were to be disbursed. This control gave rise to the fiduciary duty which the government owed appellant and which is the basis of this lawsuit. Thus, the District Court found that (R. 108-109):

"\* \* \* the Lender took over full and complete control of such project and, in so doing, was acting in a fiduciary capacity with the plaintiff."

This is an additional instance of appellee's desire to avoid facts which it finds distasteful.

Appellee is also in error in its discussion of appellant's obligation relative to overhead expenses. The same was contained in the overhead agreement of April 24, 1954 (Ex. 597/1-156), and was to "pay Overhead Expense, as hereafter defined, necessary to secure completion of Project and repayment



of Loan in such amount as may be required by Lender, which expenses are estimated to be, but shall not be limited to, \$15,000 per month." The Aleutian Homes project was completed in October, 1954 (R. 61, 96), and appellant had then paid the Administrator \$75,000 under the overhead agreement (R. 67, 100). There was no subsequent agreement indicating that appellant would pay further overhead expenses after the completion of the project.

Page 10. In discussing the payments made by appellant to The Bank of California, N. A., appellee does not give the full particulars. The bank was to have been paid \$61,000 under stage 3 of the completion agreement and \$89,000 under stage 4 (Ex. 583/1-140). However, the project manager did not see fit to pay those amounts. Consequently, it obtained payment from appellant under his guaranty, and he attempted to fulfill the obligation. Appellee's inference that appellant paid one creditor at the expense of others is highly improper.

Page 11. At page 11, appellee infers that permanent individual mortgages were not taken out and the FHA commitment expired for the reason that appellant did not pay additional overhead expenses. This is a patent absurdity. These events transpired, as the District Court found (R. 112), by reason of appellee's breach of its fiduciary duty to appellant.

Furthermore, appellee's observation is in direct contradiction to a letter prepared by HHFA, which reads as follows (R. 155):



"The FHA and FNMA commitments will be surrendered to avoid the expense of closing permanent first mortgages and extension fees, and if by October 31, 1955, it appears that the project has a reasonable chance of financial success, a refinancing plan looking toward long-range amortization of the Administrator's loan and repayment of other claims will be proposed by the Housing and Home Finance Administrator.'

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Pages 11-12. It should be added to appellee's purported summary of the claims asserted by appellant that each of said claims is based upon appellee's breach of its fiduciary duty to appellant.

## II

Appellee's alleged arguments are irrelevant and unmeritorious.

Appellee's purported arguments may be summarized as follows:

1. Appellant's claims are based on contract; and
2. Appellant's claims are within exceptions to the Federal Tort Claims Act relating to
  - a. The exercise of a discretionary function,  
or
  - b. Interference with contract rights.

These arguments arise from a misconception as to the basis of appellant's claims, and as such should not be permitted to divert attention from the real issue in this case, that is, whether appellee's breach of its fiduciary duty to appellant is cognizable under the provisions of the Federal Tort Claims Act. However, despite the irrelevance of appellee's contentions, appellant will expose the basic fallacies inherent in each.



A. Appellant's action is in tort, not for breach of contract.

It is axiomatic that a contract may give rise to a duty the breach of which is tortious, and that in such case the injured party may have an election to sue in tort or in contract.

The underlying theory is set forth in a decision from the Eighth Circuit referred to by the District Court in its opinion in this case (R, 111).

"'A relation subsisting between two persons in regard to a business, contract, or piece of property, \* \* \* of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith. Out of such a relation, the law raises the rule that neither party may \* \* \* take selfish advantage of his trust, or deal with the subject-matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of that other.'"  
(Emphasis added)

Farrow v. Dermott Drainage District  
(CCA 8, 1944) 139 F2d 800, 805

Harper v. Interstate Brewery Co. (1942) 168 Or 26, 37-38, 120 P2d 757, 762-763

"\* \* \* it may be necessary for a plaintiff to show a contract between himself and the defendant in order to establish that the defendant has assumed a position, relationship or status upon which the general law predicates a duty independent of the terms of the contract but it does not necessarily follow that his only remedy is ex contractu. If from the position, contractually assumed, a duty be raised independent of the contract an action in tort may lie.

"'\* \* \* A mere breach of contract cannot be sued on as a tort, but for tortious acts, independent of the contract, a man may be sued in tort, though one of the consequences is a breach of his contract.' Stock v. City of Boston, 149 Mass. 410, 21 N. E. 871, 14 Am.St.Rep. 430 (1889).



"Relationships of shipper and carrier, bailor and bailee, physician and patient, and attorney and client each originate in contract, express or implied; yet for a breach of duties imposed by general law upon persons assuming such relationship an action of tort may lie. In this state an action in tort may even arise directly out of contract if based on a fraudulent promise which the promisor never had any intention of fulfilling and which he successfully employed for the purpose of deceiving the promisee."

As indicated in the Harper case, numerous contractual relationships give rise to a fiduciary duty, the breach of which is tortious. These include attorney-client and physician-patient. A recent example may be found in

Widing v. Jensen, Real Est. Com. (1962) 74 Or Adv Sh 1177 in which it was held that the contractual relationship of a real estate broker and his client results in a fiduciary relationship between the two.

So, in the case at bar, the completion agreement gave appellee full control of the Aleutian Homes project, and appellee assumed such control (see findings of District Court, supra, page 6). This in turn gave rise to a fiduciary duty on the part of appellee not to exercise such control so as improperly to affect those involved in the project, including appellant. Thus, the District Court found that (R. 108-109):

"\* \* \* the Lender [appellee] could legally occupy the legal status of a fiduciary in connection with the completion of the housing project in question. Furthermore, I find and hold that the Lender took over full and complete control of such project and, in so doing, was acting in a fiduciary capacity with the plaintiff."

Appellant had an election to sue on the contract or to bring an action based upon appellee's breach of fiduciary duty. He



chose the latter. The sole question is whether that tort is within the purview of the Federal Tort Claims Act.

B. Appellant's claims are not within the discretionary function exception to the Federal Tort Claims Act.

Appellee's contention that appellant's claims are precluded by the discretionary function exception to the Federal Tort Claims Act is a patent absurdity. It may well be, as appellee suggests, that the Administrator exercised a discretionary function in entering into the negotiations which culminated in the execution of the completion agreement. It does not follow, and it is not true that he had discretion to breach the fiduciary duty arising from the relationship created by that agreement. See, for example,

Hatahley v. United States (1955) 351 US 173, 181, 100 L ed 1065, 1074

"\* \* \* Nor can the second portion of (a) exempt the Government from liability. We are here not concerned with any problem of a 'discretionary function' under the Act, see Dalehite v. United States (US) *supra*. These acts were wrongful trespasses not involving discretion on the part of the agents, and they do give rise to a claim compensable under the Federal Tort Claims Act."

Thus, the District Court found that appellee was not acting in the exercise of a discretionary function (R. 116):

"I feel that the Lender, when it accepted the completion agreement and took over control of the project under which it was to provide long-term financing, was not acting in the exercise of a discretionary function. The Lender had an absolute obligation to furnish such long-term financing."



C. Appellant's claims are not within the exceptions to the Federal Tort Claims Act relative to interference with contract rights, malicious prosecution and abuse of process.

In contending that appellant's claims are within the exceptions to the Federal Tort Claims Act relative to interference with contract rights, malicious prosecution and abuse of process, appellee has again misconstrued the basis of this action. Appellant seeks to recover damages sustained by reason of appellee's breach of its fiduciary duty, which is a tort entirely unrelated to interference with contract rights, malicious prosecution or abuse of process. If certain of the acts by which appellee breached its fiduciary duty did give rise to tort liability in these other categories, that fact would have no relevance. The fact is that appellee's acts constituted a breach of its fiduciary duty to appellant, and in delineating the issue in this case, the District Court so found (R. 112):

"\* \* \* I have already concluded that defendant could act as a fiduciary and was acting in a fiduciary or confidential capacity in assuming control over the completion of the project and the long-term financing. Assuming, arguendo, and I would so hold if I felt I had jurisdiction, that defendant in truth and in fact breached its duty in failing to provide, without justification, said long-term financing, is such breach of duty 'negligent or wrongful act or omission' within the meaning of the phrase as used in the Federal Tort Claims Act?"

At any rate, even if appellee's argument had some merit, the same could apply only to one claim asserted by appellant. Thus, he seeks to recover the following (see Appellant's Brief, pages 4-5):



1. Payments made by him for which he would have been reimbursed if appellee had not breached its fiduciary duty;

2. Sums advanced from his personal funds to pay expenses incurred during preparation for the project; and

3. The damage to and destruction of the equity of Aleutian Homes, Inc., in the Aleutian Homes project.

Only the third could conceivably fall within the exception urged by appellee.

Appellee elected to base his action upon appellee's breach of fiduciary duty. Appellee's specious argument does not divert from this fact, and from the fact that the issue in this case is whether such breach of fiduciary duty is within the purview of the Federal Tort Claims Act.

Appellee suggests (page 29) that its tortious conduct was deliberate in character and consequently not covered by the Federal Tort Claims Act. In his opening brief, appellant fully demonstrated that breach of fiduciary duty is within the scope of the Act. Appellee's suggestion is not documented, and no further comment is required.

### III

The judgment of the District Court must be reversed for the reason that breach of fiduciary duty is within the scope of the Federal Tort Claims Act.

Appellee states (page 30) that the District Court "was clearly correct in its conclusion that it lacked



jurisdiction over appellant's claim," basing this conclusion upon the specious reasoning heretofore discussed. This emphasizes one of the most interesting aspects of appellee's brief, which is its failure to discuss the real issue in this case.

The District Court found that appellee could occupy the legal status of a fiduciary in connection with the completion of the Aleutian Homes project, and that it was acting in a fiduciary capacity with appellant (R. 108-109). It found that appellee breached its fiduciary duty to appellant (R. 112). As noted above (*supra*, page 12), it stated that the question was whether such breach of duty constituted a negligent or wrongful act within the meaning of the Federal Tort Claims Act (R. 112, 113). The court held that breach of fiduciary duty was not within the purview of the Act (R. 113-114) and consequently that it did not have jurisdiction of appellant's claims (R. 116).

Appellee urges (page 30) that the trial court did not make findings on this subject. Appellee denies the existence of a fiduciary duty and its breach. The court's opinion (R. 79-117) expressly stands as its findings (R. 116, 117). Appellant accepts these findings and challenges only the court's conclusion. If appellee disputes the findings, this is the first time it has made that fact known. It did not move in the District Court to amend the findings under the provisions of Rule 52 (b), Federal Rules of Civil Procedure. Again, it did not file a cross-appeal in this court, and consequently its present protestations are not entitled to consideration.



Harrington v. Empire Const. Co. (CCA 4, 1948) 167 F2d 389, 391

"With respect to the period after May 23, 1943, the District Judge in accepting the master's findings expressed the opinion that the most credible parts of the evidence showed that the defendant adopted the recommendation of the Wage and Hour Division as of that date and placed all of its field clerks on a 48-hour rather than a fluctuating hour basis. Since this finding was favorable to the plaintiff [appellant], and the defendant has taken no appeal therefrom, we need not give it further consideration."

It indeed ill befits appellee to criticize the trial court's findings at this point.

It should be noted that since appellant's opening brief was filed herein, an additional case has been decided demonstrating that the Federal Tort Claims Act constitutes a waiver of governmental immunity from liability for all torts except those expressly removed from such waiver.

Winston v. U. S. (CA 2, June 28, 1962) 31 LW 2037

"We adopt as our own the opinion of Judge Hincks, appearing at \_\_\_\_ F.2d \_\_\_\_ (1962), 30 LW 2434 \* \* \* We think it desirable, by way of response to certain arguments raised in the course of our reconsideration of this matter, to analyze briefly several of the considerations which we believe lend additional support to the conclusion which we have reached. \* \* \*

"The Act lists thirteen kinds of claims as to which immunity is not waived. None of these exceptions remotely relates to claims by persons who have suffered injury while being held in a federal prison (28 U. S. C. 2680 (1958)).\* \* \*

"The care with which Congress detailed the express exclusion from the coverage of the Act of those situations in which the right of recovery was considered undesirable \* \* \* leaves no room for the exception of additional situations which would otherwise be covered by the statute.\* \* \*"

This case confirms the position taken by appellant in his opening brief (pages 31-39). The tort involved in the case at bar is not



one of the torts excluded from the operation of the Federal Tort Claims Act; consequently, it is within the purview of the Act,

The District Court's conclusion that it lacks jurisdiction of this action under the provisions of the Federal Tort Claims Act cannot be defended on the purported grounds urged by appellee. The issue is whether breach of fiduciary duty is cognizable under the Federal Tort Claims Act. In his opening brief, appellant demonstrated that this tort is within the purview of the Act. Appellee has not even attempted to refute this fact. Unquestionably, the judgment of the District Court should be reversed.



## CONCLUSION

Appellant accepts the findings of the District Court that under the facts presented by this case, appellee was acting in a fiduciary capacity with him, and that appellee breached the fiduciary duty it owed to him. Appellant respectfully urges, however, that the District Court was in error when it held that breach of fiduciary duty is not within the scope of the Federal Tort Claims Act.

For the reasons set forth hereinabove and in appellant's opening brief, the judgment of dismissal of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN J. WIENER  
Of Attorneys for Appellant

